

A Yong Toi Mee & Anor v Malpac Capital Sdn Bhd & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(F)-69–10
OF 2012(A)

B RAUS SHARIF PCA, ABDULL HAMID EMBONG, SURIYADI,
HASAN LAH AND JEFFREY TAN FCJJ

4 SEPTEMBER 2013

C *Contract — Termination — Right to terminate — Sale and purchase agreements with conditions precedent that remained unfulfilled — Whether contract had been suspended by mutual agreement — Whether letter of 15 November 2002 was suspension agreement — Whether conditions precedent had been fulfilled*

D Malpac Capital Sdn Bhd ('the first respondent') had granted credit facilities to a company that had pledged as securities two pieces of oil palm plantation lands ('the assets'). When the company came under the purview of Pengurusan Danaharta Nasional Sdn Bhd ('Danaharta'), the special administrators ('the SA'), who were appointed, offered the assets to the first respondent in partial settlement of the loan facility granted by it. The first respondent accepted the settlement offer subject to the SA transferring the assets to its nominee, Radiant Response Sdn Bhd ('the second respondent'). On 5 April 2002 the appellants and respondents entered into several sale and purchase agreements, which included the purchase of the assets. These agreements, which were collectively referred to as the composite agreements, consisted of a sale and purchase agreement between the appellants and the first respondent to purchase the entire paid up capital of the second respondent including the assets ('the first agreement'); a sale and purchase agreement with the second respondent to purchase the machinery and mill from the first respondent ('the second agreement'); and a supplementary agreement whereby the parties agreed that the first and second agreements were to be inter-conditional and would be completed together subject to certain conditions precedent ('the third agreement'). The total consideration for the composite agreements, which lapsed on 5 October 2002, was RM53m. The appellants paid a total sum of RM4.1m to the first respondent pursuant to the composite agreements entered into between them. Subsequent to the execution of the composite agreements, the SA entered into a series of agreements with the first respondent that ultimately led to the first respondent delegating the management of the assets and the mill to the appellants and their nominees with a profit sharing arrangement agreeable to all the parties. Subsequently, the composite agreements were extended by another six months as the conditions precedent had yet to be fulfilled. On 15 November 2002, the respondents issued a letter to the appellants stating that due to the delay in fulfilling the conditions precedent the parties should take stock of their position and in so doing

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thereafter elect to terminate the composite agreements at will. Although the appellants gave notice to complete the composite agreements, the respondents chose to terminate the composite agreements. The appellants thus commenced an action against the respondents seeking, inter alia, a decree of specific performance pursuant to the composite agreements entered into by them on 5 April 2002. The respondents filed a counterclaim against the appellants and claimed, inter alia, a declaration that the composite agreements were void and of no legal effect and for damages and costs. The High Court gave judgment for the appellants and granted the decree of specific performance. On appeal, the Court of Appeal held that the trial judge had erred in decreeing specific performance of the composite agreements. As such, the Court of Appeal set aside the order of decree of specific performance and allowed the respondents' appeal. The appellants successfully obtained leave to proceed with the present appeal. The appellants argued that the respondents' letter of 15 November 2002 had caused the time for the completion of the conditions precedent to be put at large, whereas the respondents' claimed that the letter of 15 November 2001 was a 'suspension agreement'.

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Held, allowing the appeal with costs of RM150,000:

- (1) The express terms of the letter dated 15 November 2002, which were clear and unambiguous and applied accurately to the existing facts, gave efficacy to the intention of the appellants and the respondents. On a plain reading the letter merely meant that the parties to the composite agreements could not move forward to perform the said agreements as the conditions precedent remained unsatisfied. At the same time, the letter anticipated a time when the parties would eventually decide whether to pursue or not with the composite agreements due to the allegation that the conditions precedent had not been fulfilled. Appreciating the conduct of the respondents and deciphering the letter, not for a moment did the respondents assert that the composite agreements were void on account of the failure to fulfill the conditions precedent. Instead the respondents had suggested that the parties were to take a breather and then decide whether to terminate the contracts or not (see paras 24–27).
- (2) Upon scrutinising the evidence adduced, it was clear that the Court of Appeal had misdirected itself when it stated that the conditions precedent contained in the composite agreements had remained unfulfilled. When a notice of termination of the composite agreements was served on the appellants on 28 November 2007, the conditions precedent had been satisfied. The *raison d'être* or reason for the contents of the letter of 15 November 2002 vanished with the fulfillment of the conditions precedent. There was no reason for the respondents to resist the decree of specific performance, after the impediments had been cleared (see paras 28–29).

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- A (3) In the circumstances, the decree of specific performance was reinstated and the counterclaim dismissed (see para 42).

[Bahasa Malaysia summary]

- B Malpac Capital Sdn Bhd ('responden pertama') telah memberikan kemudahan kredit kepada sebuah syarikat yang telah membuat sandaran sebagai jaminan dua bidang tanah ladang kelapa sawit ('aset tersebut'). Apabila syarikat tersebut berada di bawah kawal selia Pengurusan Danaharta Nasional Sdn Bhd ('Danaharta'), pentadbir khas ('PK'), yang telah dilantik, telah menawarkan aset tersebut kepada responden sebagai penyelesaian sebahagian daripada kemudahan pinjaman yang diberikan olehnya. Responden pertama telah menerima tawaran penyelesaian itu tertakluk kepada pindah milik aset tersebut kepada penamanya, Radiant Response Sdn Bhd ('responden kedua').
- C Pada 5 April 2002 perayu dan responden-responden telah memasuki beberapa perjanjian jual beli, yang melibatkan belian aset tersebut. Perjanjian-perjanjian tersebut, yang mana secara kolektif dirujuk sebagai perjanjian komposit, mengandungi perjanjian jual beli antara perayu-perayu dan responden pertama untuk membeli keseluruhan modal berbayar responden kedua termasuklah aset tersebut ('perjanjian pertama'); perjanjian jual beli dengan responden kedua untuk membeli mesin dan kilang daripada responden pertama ('perjanjian kedua'); dan perjanjian tambahan yang mana pihak-pihak bersetuju bahawa perjanjian-perjanjian pertama dan kedua adalah bersyarat antara satu sama lain dan akan siap bersama tertakluk kepada prasyarat tertentu ('perjanjian ketiga'). Keseluruhan balasan untuk perjanjian komposit tersebut, yang luput pada 5 Oktober 2002, adalah RM53 juta. Perayu-perayu telah membayar keseluruhan jumlah RM4.1 juta kepada responden pertama mengikut perjanjian komposit yang dimasuki antara mereka. Berikutan pelaksanaan perjanjian komposit tersebut, PK telah memasuki siri perjanjian dengan responden pertama yang akhirnya membawa kepada responden pertama mengagihkan pengurusan aset tersebut dan kilang itu kepada perayu-perayu dan penama-penama mereka dengan aturan perkongsian keuntungan yang boleh dipersetujui semua pihak. Berikutan itu, perjanjian komposit itu telah dilanjutkan selama enam bulan lagi kerana prasyarat masih belum dipenuhi. Pada 15 November 2002, responden-responden telah mengeluarkan surat kepada perayu-perayu menyatakan bahawa akibat daripada kelewatan memenuhi prasyarat tersebut pihak-pihak hendaklah bertanggungjawab dengan kedudukan mereka dan dengan berbuat demikian memilih untuk menamatkan perjanjian komposit secara rela. Walaupun perayu-perayu telah memberikan notis untuk menyempurnakan perjanjian komposit tersebut, responden-responden telah memilih untuk menamatkan perjanjian komposit tersebut. Perayu-perayu dengan itu telah memulakan tindakan terhadap responden-responden memohon, antara lain, dikri untuk pelaksanaan spesifik menurut perjanjian komposit yang dimasuki antara mereka pada 5 April 2002. Responden-responden telah memfailkan tuntutan balas terhadap perayu-perayu dan menuntut, antara lain, deklarasi bahawa
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perjanjian komposit tersebut tidak sah dan tidak mempunyai kesan perundangan dan untuk ganti rugi dan kos. Mahkamah Tinggi telah menyampaikan penghakiman menyebelahi perayu-perayu dan memberikan dikri untuk pelaksanaan spesifik. Atas rayuan, Mahkamah Rayuan memutuskan bahawa hakim perbicaraan terkhilaf dalam memberi dikri untuk pelaksanaan spesifik berhubung perjanjian komposit tersebut. Oleh itu, Mahkamah Rayuan telah mengetepikan perintah berhubung dikri untuk pelaksanaan spesifik dan membenarkan rayuan responden-responden. Perayu-perayu telah berjaya memperoleh kebenaran untuk meneruskan dengan rayuan ini. Perayu-perayu berhujah bahawa surat responden-responden bertarikh 15 November 2002 telah menyebabkan masa untuk prasyarat siap dilanjutkan, manakala responden-responden mendakwa bahawa surat 15 November 2001 adalah 'suspension agreement'.

Diputuskan, membenarkan rayuan dengan kos RM150,000:

- (1) Terma nyata surat bertarikh 15 November 2002, yang jelas dan tidak taksa dan terpakai dengan tepat kepada fakta yang ada, memberikan keberkesanan kepada niat perayu-perayu dan responden-responden. Berdasarkan bacaan biasa surat tersebut hanya bermaksud bahawa pihak-pihak kepada perjanjian komposit tersebut tidak boleh meneruskan dengan pelaksanaan perjanjian tersebut kerana prasyarat masih belum dipenuhi. Pada masa sama, surat tersebut menjangka satu masa apabila pihak-pihak akhirnya bersetuju untuk sama ada meneruskan atau tidak dengan perjanjian komposit oleh kerana pengatauan bahawa prasyarat tidak dipenuhi. Dengan menyedari perbuatan responden-responden dan mentaksirkan surat tersebut, tidak sekali responden-responden menegaskan bahawa perjanjian komposit tersebut adalah tidak sah disebabkan kegagalan untuk memenuhi prasyarat tersebut. Sebaliknya responden-responden telah mencadangkan agar pihak-pihak berfikir dan kemudian memutuskan sama ada untuk menamatkan kontrak-kontrak tersebut atau tidak (lihat perenggan 24–27).
- (2) Setelah meneliti keterangan yang dikemukakan, adalah jelas bahawa Mahkamah Rayuan tidak salah arah apabila ia menyatakan bahawa prasyarat tersebut yang terkandung dalam perjanjian komposit masih belum dipenuhi. Apabila notis penamatan perjanjian komposit tersebut disampaikan ke atas perayu-perayu pada 28 November 2007, prasyarat tersebut telah dipenuhi. Sebab untuk kandungan surat 15 November 2002 lenyap dengan prasyarat yang dipenuhi. Tiada sebab untuk responden-responden enggan menerima dikri untuk pelaksanaan spesifik, selepas halangan dilupuskan (lihat perenggan 28–29).
- (3) Dalam keadaan berikut, dikri untuk pelaksanaan spesifik dikembalikan semula dan tuntutan balas ditolak (lihat perenggan 42).]

A Notes

For cases on right to terminate, see 3(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 6525–6540.

Cases referred to

- B** *Central Bank of India v Hartford Fire Insurance* AIR 1965 SC 1288, SC (refd)
Ideal City Development Sdn Bhd v Dynamic Mould Sdn Bhd [2003] 3 MLJ 152, CA (not folld)
Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 All ER 98, HL (refd)
- C** *Kamla Devi v Takhatmal* AIR 1964 SC 859, SC (refd)
Morello Sdn Bhd v Jaques (International) Sdn Bhd [1995] 1 MLJ 577; [1995] 2 CLJ 23, FC (refd)
National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd [1983] 2 MLJ 211, FC (not folld)
- D** *Setapak Heights Development Sdn v Tekno Kota Sdn Bhd* [2006] 3 MLJ 131; [2006] 2 CLJ 337, CA (refd)

Legislation referred to

- E** Contracts Act 1950 ss 32, 33, 34
Pengurusan Danaharta Nasional Berhad Act 1998

Appeal from: Civil Appeal No A-02–1449 of 2011 (Court of Appeal, Putrajaya)

- F** *Cyrus Das (A Iruthaya Raj and Capt Abdul Razak Hashim with him) (Raj Selva & Co) for the appellants.*
DP Naban (Logan Sabapathy, Ang Hean Leng and Yong Shih Han with him) (Logan Sabapathy & Co) for the respondents.

G Suriyadi FCJ (delivering judgment of the court):

- H** [1] We are dealing with an appeal now. Being aggrieved by the decision of the Court of Appeal the plaintiffs ('the appellants'), had successfully obtained leave from the Federal Court on 1 October 2012 to have the following questions determined by us, namely:
- (a) whether ss 32–34 of the Contracts Act 1950 apply to suspended contracts containing conditions precedent to be fulfilled;
- I** (b) whether in the circumstances reliance on the cases of *National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211 and *Ideal City Development Sdn Bhd v Dynamic Mould Sdn Bhd* [2003] 3 MLJ 152 as stating the correct law on contingent contracts could apply to contracts containing conditions precedent which are suspended;

- (c) where a contract has been suspended by mutual agreement of the parties, whether time for performance is also thereby suspended; A
- (d) where a contract between parties has been mutually suspended as opposed to being terminated, whether all contractual obligations thereunder are likewise suspended until revival of the contract or its earlier termination; B
- (e) whether affirmation of the suspended contract by one of the parties in the aftermath of the suspension revives the contract for purposes of specific performance; and C
- (f) whether a vendor under a contract for sale whose obligation was to fulfill the conditions precedent could take advantage of his own failure to say that time has run out following a temporary suspension of the contract? D

[2] This appeal came about as the appellants had commenced an action on 21 April 2007 at the High Court against the defendants seeking, inter alia, for a decree of specific performance pursuant to three agreements (the composite agreements), entered into by them on the same date ie on 5 April 2002. The defendants filed a counterclaim against the appellants and claimed, amongst others a declaration that the composite agreements were void and of no legal effect, and prayed for damages and costs. In this appeal, the first and third defendants are respectively referred to as the first and second respondents or collectively as the respondents. The second defendant is not involved with the appeal. E

[3] On 5 May 2011, after a full trial, the High Court gave judgment for the appellants and granted the decree of specific performance. The respondents being dissatisfied with the High Court decision filed an appeal before the Court of Appeal. On 17 January 2012, it allowed the respondents' appeal with costs following which the High Court order of decree of specific performance was set aside. As regards the respondents' counterclaim which was yet to be resolved, the Court of Appeal ordered it to be remitted to the High Court before the same judge to hear the parties, and to make a reasoned judgment thereon. The High Court was ordered to take into account the evidence adduced during the trial before it, together with the effect of the decision of the Court of Appeal in respect of the appellants' claim. The High Court dismissed the respondents' counterclaim. F

[4] In its grounds of judgment the Court of Appeal, inter alia, adjudged as follows: G

Upon a true construction of cl 3, the said letter, the agreed facts and the commercial purposes for which the three agreements were entered into by the parties who are experienced in commercial matters, we are of the view that the conditions precedent H

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- A contained in cl 3 remain unfulfilled. Hence, the three agreements have clearly been suspended to enable the parties to consider their respective positions. There being no evidence that the suspension had been lifted, the agreements remained suspended. That there remained part of the deposits being retained and that the plaintiffs-purchasers continued with the joint management and operation existed by virtue of para 3 of the letter of 15 November 2002 which governs the further relationship between the parties after the suspension of the agreements. Not by virtue of the suspended agreements. The clear language of the letter provides no basis for the suggestion the letter was to give only the plaintiffs-purchasers time to consider its position. The evidence shows attempts to move forward, but these for one reason or another clearly failed, and the fact remained the suspension of the earlier agreements remained in force. In the circumstances, the learned judge had erred in decreeing specific performance for the plaintiffs-purchasers in respect of the three agreements.

THE ANTECEDENT AND FACTS OF THIS APPEAL

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- E [5] To fully understand the appeal, it is necessary for us to touch on the chronology of events that culminated in the execution of the composite agreements and the eventual litigation of the matter in 2007 (Case 22–109 of 2007). We have alluded to and now reproduce much of the undisputed facts sourced from the statement of agreed facts and common documents. Since the events that took place prior to 5 April 2002 have a great bearing on the composite agreements we now discuss those pre-contractual events.
- F [6] Prior to 5 April 2002 (the date of the composite agreements), the first respondent was a secured creditor of a company called Ganda Plantations (Perak) Sdn Bhd ('Ganda') and Cempaka Sepakat Sdn Bhd ('Cempaka'). The first respondent had granted facilities to Techno-Asia Holdings Bhd ('TAHB') and amongst the securities pledged for the facilities were two parcels of oil palm plantation land belonging to Ganda and Cempaka. The two abovementioned pieces of land are:
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- H (a) HS(D) LP 14132 Lot 6863 Mukim of Hutan Melintang, Daerah Hilir Perak registered under the name of Ganda; and
- (b) HS(D) 13127 Lot 11644 Mukim Durian Sebatang, Daerah Hilir Perak registered under the name of Cempaka.
- (hereinafter collectively referred to as *the assets*).
- I [7] TAHB later came under the purview of Pengurusan Danaharta Nasional Bhd ('Danaharta'). On or about 30 April 2001, special administrators ('SAs') were appointed in respect of Ganda and Cempaka under the provisions of the Pengurusan Danaharta National Berhad Act 1998. Pursuant to two separate workout proposals dated 26 November 2001, as the chargors had defaulted, the assets were offered by the SAs to the first respondent in partial settlement of

the loan facility granted by it. The first respondent accepted the workout proposal subject to the SAs transferring the assets to its nominee ie the second respondent. The assets were eventually transferred by the SAs and registered in the name of the second respondent on or about 5 August 2003.

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[8] We now return to the aforesaid date of 5 April 2002 where the first respondent, the second respondent and the appellants entered into several written agreements referred to earlier as the composite agreements. The composite agreements comprise:

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- (a) a sale and purchase agreement (the first agreement) between the first respondent and the appellants whereby the first respondent, inter alia, agreed to sell and the appellants agreed to buy the entire paid up capital of the second respondent including the assets. Clause 3(1)a–g of the first agreement contained *conditions precedent* which required compliance by the respondents, such as the approvals to be obtained from the relevant authorities and the like;
- (b) a sale and purchase agreement (second agreement) between the second respondent and the appellants for the sale and purchase of the machinery and mill from the first respondent. A sum of RM100,000 being the first installment was paid under the second agreement; and
- (c) by way of the first respondent's letter dated 5 April 2002 and the supplementary agreement between the first respondent and the appellants, parties agreed that the first and the second agreements were to be inter-conditional and shall be completed together subject to certain conditions precedent.

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[9] The total consideration for the first and second agreements was RM53m. Together with the RM100,000 instalment payment the appellants also paid an additional RM4m to the first respondent pursuant to the composite agreements entered between them.

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[10] The aforesaid conditions precedent (cl 3a–g), in substance to be fulfilled by the first respondent attached to the first agreement, inter alia, are as follows:

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- (a) that the approval of the SAs be obtained to transfer the said assets (*here being the plantations and the mill*) to the second respondent;
- (b) that the SAs shall execute all relevant documents to transfer the said assets free from encumbrances to the second respondent;
- (c) that the approval for the transfer of the land mentioned in section 1 of the First Schedule in favour of the second respondent be obtained from the Menteri Besar of Perak;

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- A** (d) that the approval from the foreign investment committee be obtained for the transfer of the assets to the second respondent;
- (e) that the assets be transferred to the second respondent free from encumbrances; and
- B** (f) that the existing PORLA licence for the factory more specifically mentioned in section 2 of the First Schedule be surrendered to the relevant authorities to enable the appellants or their nominees to apply for a new PORLA licence.
- C** [11] Subsequent to the execution of the composite agreements the SAs entered into a series of agreements dated 4 June 2002 with the first respondent whereby the first respondent through the second respondent was to manage the assets and the mill. The first respondent thereafter delegated the management of the assets and the mill to the appellants and their nominees, namely one Goh
- D** Ah Peng and Buloga Pothal upon a sharing formula, evidenced by the appellants' and solicitors' letter dated 31 May 2002 read together with the appellants' indemnity dated 4 June 2002 and the first respondent's letter dated 6 June 2002. Later, when a new profit sharing arrangement was executed on 20 February 2003 between the appellants and the respondents, the
- E** respondents were guaranteed RM500,000 per month (RM6m per year) and RM25,000 as rental for the mill.
- [12] By a letter dated 12 August 2002, as the conditions precedent had yet to be fulfilled, the composite agreements were extended by another six months subject to a further payment of RM3m together with the monthly interest of
- F** RM600,000. Later the extension, by agreement, as per letter dated 15 November 2002 was rescinded. The RM3m was returned to the appellants.
- [13] After the side agreements with the SAs on 4 June 2002 were made the first respondent made a proposal on 2 October 2002 to the SAs to purchase the mill for a purchase price of RM5.5m. This became a reality on 5 August 2003 when the purchase was effected to the second respondent.
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- [14] On 15 November 2002, a letter was issued by the respondents to the appellants, stating that the parties had confirmed and accepted, inter alia:
- H** ... that for the moment, each of us shall be entitled but reserved our respective rights to terminate the overall arrangement and understanding (including the Shares Agreement of 5 April 2002 which lapsed on 5 October 2002 since all relevant approvals have not been obtained) to enable each of us to consider our respective
- I** positions.

THE PARTIES' ARGUMENTS

- [15] The appellants argued that the letter of 15 November 2002 issued by

the respondents was executed by both parties, amongst others to give time to the first respondent to obtain the necessary approvals for the purchase of the mill, comply with the other conditions, and in the course of that period causing time for the completion of the conditions precedent to be put at large. The letter also gave a choice to the parties to terminate the agreement if they so wish.

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[16] Having considered the composite agreements as still subsisting despite the 15 November 2002 letter, the appellants attempted to complete the sale by paying the second and final installment under the first agreement, together with the balance of the purchase price under the second agreement, but were rejected by the respondents. As evinced by letters dated 30 September 2003 and 6 October 2004 the appellants gave notice to the first respondent to complete the composite agreements.

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[17] The appellants also come across strongly by submitting that by the very conduct of the respondents, together with the contents of the exchanged communication, never considered the composite agreements as having been terminated. The continuous consultation by the respondents with the appellants merely supported the latter's contention that the composite agreements were still subsisting.

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[18] The respondents claimed that the letter dated 15 November 2002 was a 'suspension agreement', as agreed to by the appellants, having the object of renegotiation between the parties due to the delay and other circumstances prevailing at that time.

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[19] Tracing the submission of the respondents, their emphasis was the conditionality of the composite agreements, and with the conditions precedent of cl 3 not fulfilled, the obligation to sell and buy had lapsed. Why the agreement was not expressly terminated by the respondents is answered in this way by the respondents:

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... what was also further expressly acknowledged by the parties was that each of the parties was entitled but reserved their respective rights to terminate the overall arrangement and understanding recognizing that there was still an outstanding account on the reduced deposits that the appellants had left with the respondents.

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[20] The respondents further submitted that both parties had acknowledged that the composite agreements (vehemently denied to by the appellants) had lapsed but had decided to keep the agreements open for parties to renegotiate a fresh agreement for the sale and purchase of the plantations and the mill. The continuing distinct management of the plantations was another aspect of their relationship which should not be connected to the sale and purchase of the

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A assets.

OUR VIEW OF THE 15 NOVEMBER 2002 LETTER

B [21] The respondents conceded in the course of the submission that the
C 15 November 2002 letter has to be construed by giving the ordinary and usual
D meaning for the various terms used by the parties. We have no disagreement
E over this concession as this is trite. Having perused the letter we find that the
F expressed terms, namely the stipulations that give efficacy to the intention of
G the appellants and the respondents, are clear and unambiguous and apply
H accurately to the existing facts. The next step is to identify the intention. The
I intention may be gauged from the meaning of the words parties have said
rather than what the parties meant to say; from there we give effect to their
bargain (*Morello Sdn Bhd v Jaques (International) Sdn Bhd* [1995] 1 MLJ 577;
[1995] 2 CLJ 23; *Central Bank of India v Hartford Fire Insurance* AIR 1965 SC
1288; *Setapak Heights Development Sdn v Tekno Kota Sdn Bhd* [2006] 3 MLJ
131; [2006] 2 CLJ 337). The court in *Kamla Devi v Takhatmal* AIR 1964 SC
859 comprehensively opined:

E If the language is clear and unambiguous and applies accurately to existing facts, it
shall accept the ordinary meaning, for the duty of the court is not delved deep into
the intricacies of the human mind to ascertain one's undisclosed intention, but only
to take the meaning of the words used by him, that is to say his expressed intentions.

F [22] So, from a reading of the 15 November 2002 letter, were the expressed
terms indicative of a 'suspension agreement', in order for parties to return to the
negotiation table caused by the delay in fulfilling the conditions precedent
then, causing the contracts to lapse, or merely to give time to the first
respondent to obtain the necessary approvals pending which, time was put at
large?

G [23] Interestingly in the written submission of the respondents they have
consistently alluded to the phrase 'conditional contracts' for the composite
contracts rather than for the *formation of the entire contract* dependent upon the
H conditions precedent. The appellants, regardless of the respondents'
I phraseology have argued consistently that the composite agreements were
conditional contracts, the fulfillment of which was dependent upon the
conditions precedents. On that premise they were on common ground.

I [24] Having scrutinised the evidence, we have arrived at the following
conclusion. We hold the view that the letter of 15 November 2002 reflects the
latest position of the parties *then*, in relation to their rights, as agreed upon in
the composite agreements. On a plain reading it merely means that the parties
could not move forward to perform the three agreements as the conditions for

performance were still left unfulfilled, that is if the conditions precedent were indeed not satisfied. The following statements (as found in the 15 November 2002 letter, inter alia, that, 'the palm oil is not for sale' as indicated by the SAs, followed by the remarks that 'this recent event undermines our overall and strictly composite 2002 arrangement, for the sale of the entire issued and paid up shares in Radiant Response Sdn Bhd (the second respondent)' and 'since all relevant approvals have not been obtained', reflected how near impossible performance of the agreements was from the point of view of the respondents.

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[25] By the terms of that 15 November 2002 letter, parties could take stock of their own position and in so doing thereafter elect to terminate at will, a right that was given to either party. The words, 'each of us shall be entitled but reserves our rights to terminate ... to enable each of us to consider our respective positions' supports that view.

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[26] The letter anticipated a time when parties would eventually decide whether to pursue or not with the composite agreements due to the allegation that the conditions precedent had not being fulfilled. Again, this is clearly borne out by the phrase, 'We also confirm our understanding that until each of us decides on our final position ...'

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[27] Appreciating the conduct of the respondents and deciphering the letter, not for a moment did the respondents assert that the composite agreements were void on account of the failure to fulfill the conditions precedent. Instead, as the respondents alleged parties were to take a breather, do what was needed to be done, and then decide whether to terminate the contracts or otherwise. The poser is when those conditions precedent were fulfilled could either party terminate the agreements pursuant to the letter of 15 November 2002? In the circumstances of the case, yielding to legal common sense once those conditions precedent were fulfilled, with no more formal impediment of performance outstanding, the reason for parties to terminate the agreements had evaporated (*Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 /477).

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[28] We now scrutinise the evidence adduced and decide whether the conditions precedent were indeed not fulfilled. From the evidence we conclude that the Court of Appeal misdirected itself when stating that the conditions precedent contained in cl 3 had remained unfulfilled. The following, as found in the agreed facts statement, are the dates when the major conditions precedent were obtained (*way before the 15 November 2002 letter*):

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- A (a) approval by FIC 20 June 2002;
(b) approval given by the state authority for transfer of the assets to the second respondent 16 August 2002;
- B (c) resolution of the first respondent authorising sale of the assets to the appellant; and 23 August 2002
(d) by 5 August 2003 the purchase of the mill became a reality when the purchase was effected to the second respondent.

C [29] Only on 28 November 2007 was a notice of termination of the composite agreements served on the appellants, by which time the conditions precedent had been satisfied. With the conditions precedent satisfied what remained thereafter was performance. We see no reason why the respondents could validly resist the decree of specific performance after the impediments had been cleared in the circumstances of the case. The *raison d'être* or reason for the contents of the 15 November 2002 letter vanished with the fulfillment of the conditions precedent.

E OUR ANALYSIS OF THE OTHER RELEVANT FACTS

[30] Despite the abovementioned view, which is sufficient to vindicate the appellants' contention, for completeness, we have undertaken the following analysis regarding the facts.

F [31] By 18 September 2002 the respondents had collected RM8,320,000 as deposit for the acquisition of the second respondent and the mill. RM4,200,000 was refunded though the balance of RM4.1m was retained as deposits to be held on an interest free basis. The respondents' conduct of retaining part of the consideration sum paid by the appellants, in respect of the purchase of the second respondent, especially the first instalment of RM100,000 under cl 2(1) of the first agreement together with the deposit of RM4.1m interest free did not help the respondents' case and gave the indication that they had not abandoned the composite agreements.

G [32] In the letter dated 7 August 2003 to the KLSE, when relating about a new profit sharing arrangement executed on 20 February 2003 between the appellants and themselves the respondents stated that the RM4.1m was *deposit* on an interest free basis for the duration of the suspension agreement. The retention of the returnable deposits free of interest for a period of over five years certainly militated against the argument of the respondents that the contracts had lapsed (*National Land Finance Co-operative Society Ltd v Sharidal Sdn End* [1983] 2 MLJ 211 and *Ideal City Development Sdn Bhd v Dynamic Mould Sdn*

Bhd [2003] 3 MLJ 152). In fact, persistently alluding to the terminology ‘deposit’ was of no help to the respondents’ case either.

A

[33] In that letter of 7 August 2003, when explaining the abovementioned new profit sharing arrangement, the respondents explained that they were guaranteed RM500,000 per month payment (RM6m per year), and RM25,000 as rental for the mill. Financial consideration therefore could not be discounted to be one of the reasons why the respondents did not terminate the composite arrangements, a fact which had not escaped the High Court’s comments, particularly the financial benefits derived from the delay in terminating the composite agreements.

B

C

[34] Without the need to detail out the other pieces of evidence, how could the appellants not have a reasonable expectation that the respondents intended to pursue the contract to fruition? It was only on 28 November 2007 that the first respondent finally serve a notice of termination of the composite agreements ie five years and 13 days later. They also offered to tender the refund of the aforesaid RM4.1m paid as deposit though challenged by the appellants vide letter of 12 December 2007. *By then all the conditions precedent had been fulfilled.*

D

E

[35] We now briefly discuss the questions for our determination. The poser for the first question is whether ss 32–34 of the Contracts Act 1950 apply to suspended contracts containing conditions precedent to be fulfilled. These three sections fall under Part IV falling under ‘OF CONTINGENT CONTRACT’ of the Contracts Act 1950. They read as follows:

F

s 32 :A ‘contingent contract’ is a contract to do or not to do something, if some event, collateral to the contract, does or does not happen.

s 33 : (a) Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

G

(b) If the event becomes impossible, such contracts become void

s 34 :Contingent contracts to do or not to do anything if an uncertain future event does not happen can be enforced when the happening of that event becomes impossible, and not happening.

H

[36] The answer to question (a): is in the *affirmative*.

I

[37] The poser for question (b) reads whether in the circumstances reliance on the cases of *National Land Finance Co-operative Society Ltd v Sharidal Sdn Bhd* [1983] 2 MLJ 211 and *Ideal City Development Sdn Bhd v Dynamic Mould Sdn Bhd* [2003] 3 MLJ 152 (a Court of Appeal case) as stating the correct law

- A on contingent contracts could apply to contracts containing conditions precedent which are suspended. Our answer is that since the conditions precedent had all been satisfied with the exception of the mill, but still effected to the second respondent on 5 August 2003 the two cases therefore are inapplicable thus relieving us of the necessity to supply an answer to the question.
- B

[38] Taking the matter a step further, in the unlikely event that the conditions precedent had been suspended and thus not fulfilled, question (b) will be answered in the *affirmative*.

C

[39] Answer to questions (c) and (e): *affirmative*.

[40] Answer to question (d): affirmative subject to the lifting of suspension by then other party.

D

[41] Answer to question (f): *negative*.

CONCLUSION

E

[42] We therefore allow this appeal with costs of RM150,000 for here and the court below including costs for the leave application. All the orders of the Court of Appeal are set aside and the orders of the High Court be reinstated. The decree of specific performance is reinstated and the counterclaim dismissed. We further order the balance sum of RM48.9m be refunded within one month from the date of this order.

F

[43] Deposit is ordered to be refunded.

G

Appeal allowed with costs of RM150,000.

Reported by Kohila Nesan

H

I